*8 Qrs 1 Aps and Others v. Frandsen

Before the English Court of Appeal

CA

(Simon Brown, Auld and Thorpe L.JJ.)

21 May 1999

On appeal from the High Court, Queen's Bench Division (Sullivan J.) [FN1]

E.C. Judgments Convention (Brussels) 1968. Scope. Revenue matters.

Indirect as well as direct enforcement of tax claims, at least where the sole beneficiary of any successful action will be the tax authorities, falls outside the scope of the E.C. Judgments Convention. [20], [35], [36]

FN1 Judgment of 20 November 1998, reported at [1999] I.L.Pr. 432.

Non-enforcement of foreign revenue laws. Compatibility with European Community law.

Community law does not provide any reason to enforce foreign revenue laws, by reference to the rules on free movement of services or otherwise. [29]-[30], [35], [36]

An action was brought by Danish companies in compulsory liquidation against their former owner, who was domiciled and resident in the United Kingdom. The action was framed as one in restitution and damages to recover losses incurred through the stripping of the plaintiff's assets by the defendant. In reality, however, the action was being funded by the Danish revenue authorities, who had also appointed the liquidator, and was limited to the amount claimed by the revenue authorities for corporation tax due.

The defendant sought to resist the action by relying on the rule that the courts will not directly or indirectly enforce the penal, revenue or other public laws of another country (Dicey & Morris rule 3). The plaintiffs argued that this approach was inconsistent with European Community law, and in particular with the E.C. Judgments Convention (Brussels) 1968.

The Court of Appeal found that the claim, as a revenue matter (Article 1(1)), fell outside the scope of the Judgments Convention: such comparative material as was available indicated that other Contracting States also declined to enforce the revenue laws of another country, whether directly or indirectly, thus indicating their approach to the scope of the concept of revenue matters. On the other hand, an argument that the claim fell outside the scope of the Convention as a matter relating to the "winding-up of insolvent*9 companies" (Article 1(2)) was rejected--the claim was not one specific to bankruptcy law.

If the claim had been regarded as a civil matter within the meaning of the Convention, the Court indicated that it would have been inappropriate to strike it out as nevertheless bound to fail, since this would undoubtedly impair the effectiveness of the Convention scheme.

Further arguments based on the Community law right to free movement of services were also canvassed before the Court but it was held that any restrictions on the movement of services could be objectively justified.

Representation

Christopher Vajda Q.C. and Conor Quigley, instructed by Eversheds, appeared for the appellant.

Thomas Ivory and Phillip Baker, instructed by Osborne Clark, appeared for the respondent.

The following cases were referred to in the judgment:

European Court of Justice

1. Kongress Agentur Hagen GmbH v. Zeehaghe BV (C-365/88), 15 May 1990: [1990] E.C.R. I-1861; [1991] I.L.Pr. 3.

2. Hubbard v. Hamburger (C-20/92), 1 July 1993: [1993] E.C.R. I-3777.

3. Gourdain v. Nadler (133/78), 22 February 1979: [1979] E.C.R. 733; [1979] 3 C.M.L.R. 180.

4. Duijnstee v. Goderbauer (288/82), 15 November 1983: [1983] E.C.R. 3663; [1985] 1 C.M.L.R. 220.

English courts

5. Peter Buchanan Limited and Macharg v. McVey [1955] A.C. 516.

6. Government of India v. Taylor [1955] A.C. 491.

7. State of Norway's Application (Nos 1 & 2), In Re [1990] A.C. 723.

8. Williams and Humbert Ltd v. W. & H. Trade Marks (Jersey) Ltd [1986] A.C. 368.

French courts

9. Bemburg v. Fisc de la Province de Buenos Aires [1949] Semaine Juridique II 4816.

10. Heritiers Vogt v. Feltin (Cass. 1928).

JUDGMENT

Simon Brown L.J.:

[1] It is a fundamental principle of English law that our courts will not directly or indirectly enforce the penal, revenue or other public laws of another country. [FN2]

FN2 See, r. 3 of Dicey & Morris, The Conflict of Laws, and the comment upon it (12th ed., 1993).

[2] On the English authorities it is clear that the present action falls foul of that rule: in substance it involves the indirect enforcement of Denmark's revenue law.

[3] Do the authorities on indirect enforcement, however, survive the United Kingdom's accession (in 1972) to the E.C. Treaty, and more*10 particularly the United Kingdom's implementation (in 1982) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments (the Convention)? That is the central question raised on this appeal. Sullivan J. [FN3] below held that they do and in the result struck out this action under RSC Ord. 18, r. 19 on the ground that it was bound to fail. The appellants contend that such a conclusion is contrary to Community law.

FN3 [1999] I.L.Pr. 432.

[4] The first paragraph of Article 1 of the Convention provides:

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

Is the claim which the appellants seek to advance here a revenue matter within the meaning of Article 1? That is the critical first issue which arises.

[5] Even if it is not--even, that is, if the Convention applies--does that nevertheless leave the English courts free to strike out the claim--not, of course, for want of jurisdiction, but rather because ultimately it cannot succeed? The respondent so contends and this, indeed, was the primary holding of the judge below. That is the second issue.

[6] Before us the appellants for the first time raised a third issue. They contend that even if this claim is properly to be regarded as a revenue matter and thus excluded from the Convention, nevertheless Community law precludes the English courts from declining to hear it on its merits and to enforce it if it succeeds. In other words, they contend that in so far as rule 3 extends to indirect enforcement, it is incompatible with the Treaty irrespective of what the Convention

may say.

The facts

[7] The appellants are all Danish companies in compulsory liquidation. The respondent is domiciled (within the meaning of the Convention) and resident in the United Kingdom. Until 1992 he owned the companies either directly or indirectly. In November 1992 the entire assets of the companies were disposed of for cash which the following month was used to acquire the respondent's shares. In July 1994 the companies were put into liquidation on the ground that they had been engaged in asset-stripping. In March 1995 the Danish tax authorities claimed against them corporation taxes of some 30 million Dkr together with some 10 million Dkr interest, a total tax claim of some 40 million Dkr (nearly <<PoundsSterling>>4 million). The companies have no assets and the only creditors are the Danish tax authorities. It was those authorities who appointed the liquidator and who are funding this action by the companies against the respondent. Their claim against him is limited to the principal sum, together with interest, claimed by*11 the Danish tax authorities against them. The nature of the claim is summarised in the appellants' evidence as follows:

The claim against the defendant arises out of his involvement in the stripping of the plaintiffs' assets. In essence, the plaintiffs submit that the purchase price for the defendant's shares in each of them was paid, at the defendant's instance, from their own funds or using their assets. The plaintiffs' claims are for, in the first instance, restitution of the value of their assets which were disposed of in order to finance the purchase of the defendant's shares and, in the alternative, damages arising out of the defendant's negligence and/or reckless default in allowing the plaintiffs to suffer loss as a result of the asset-stripping in which he was involved.

The basis of the restitution claim is a provision in Danish company law prohibiting companies from providing financial assistance for the acquisition of their own shares.

Binding authority in point

[8] These facts are in all material respects indistinguishable from those in Peter Buchanan Limited and Macharg v. McVey, [FN4] the leading authority on this aspect of indirect enforcement, an Irish decision approved by the House of Lords in Government of India v. Taylor [FN5]--where Lord Keith of Avonholm described Kingsmill Moore J.'s judgment as "admirable" and containing "an able and exhaustive examination of the authorities"--and again in In Re State of Norway's Application (Nos 1 & 2). [FN6] The facts in Buchanan can conveniently be taken from Lord Keith's summary of the case in Government of India v. Taylor [FN7]:

FN4 [1955] A.C. 516.

FN5 [1955] A.C. 491.

FN6 [1990] A.C. 723.

FN7 At p. 510.

The plaintiff company was a company registered in Scotland which had been put into liquidation by the revenue authorities in Scotland under a compulsory winding-up order in respect of a very large claim for excess profits tax and income tax. The liquidator was really a nominee of the revenue. ... The defendant having realised the whole assets of the company in his capacity as a director and having satisfied substantially the whole of the company's indebtedness, other than that due to the revenue, by a variety of devices had the balance transferred to himself to his credit with an Irish bank and decamped to Ireland. The action was in form an action to recover this balance from the defendant at the instance of the company directed by the liquidator. ... The judge held that the transaction was a dishonest transaction designed to defeat the claim of the revenue in Scotland as a creditor ... On the other hand, he held that although the action was in form an action by the company to recover these assets it was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another State. He accordingly dismissed the action.

There can be no distinction between the defendant's sale of the company's assets and his pocketing of the proceeds in Buchanan and ***12** the respondent's sale of the companies' assets and use of the proceeds to fund their purchase of his own shares in the present case. It can, therefore, equally be said of the appellants' claim here as was said of the liquidator's claim in Buchanan, [FN8]

FN8 per Kingsmill Moore J., at p. 529.

that the whole object of the suit is to collect tax for a foreign revenue, and ... this will be the sole result of a decision in favour of the plaintiff.

[9] The appellants, indeed, do not seriously seek to distinguish Buchanan on the facts. Certainly they made no such attempt below and, although Mr Vajda Q.C. at one stage of his argument suggested possible differences between the cases, these appeared to dissolve on further consideration and were not, I think, ultimately pursued. Nor does Mr Vajda contend that as a matter of domestic law this court could do otherwise than apply Buchanan (although he leaves open the possibility of the House of Lords wishing to revisit this area of indirect enforcement). Rather, as stated, the appellants contend that the principle cannot apply in the Community law context. I come, therefore, to the three issues earlier identified.

Issue 1: What are "revenue matters" within the meaning of Article 1?

[10] Section 3 of the Civil Jurisdiction and Judgments Act 1982 provides that the Convention shall be interpreted "in accordance with the principles laid down by and any relevant decision of the European Court", and also that regard may be had inter alia to Professor Peter Schlosser's report on the Accession Convention [FN9] (the Convention by which in 1978 the United Kingdom, Ireland and Denmark acceded to the Brussels Convention).

FN9 [1979] O.J. C59/118.

[11] The second sentence of Article 1--stating that the Convention "shall not extend, in particular, to revenue, customs or administrative matters"--was added by the Accession Convention. That, states Dicey, [FN10] was "following the request of the United Kingdom in the accession negotiations. The exclusion of revenue and customs matters reflects the general principle found in most countries that foreign tax laws will not be enforced."

FN10 At p. 276.

[12] As, however, Professor Schlosser's report makes plain, the inclusion of this second sentence was purely declaratory. It did not purport to reduce the scope of Article 1, only to clarify it. As Professor Schlosser said:

The distinction between civil and commercial matters on the one hand and matters of public law on the other is well recognised in the legal systems of the original [six] Member States ...

In the United Kingdom and in Ireland the expression "civil law" is not a technical term and has more than one meaning. It is used mainly as the opposite of criminal law. Except in this limited sense, no distinction is made between "private" and "public" law which is in any way comparable to***13** that made in the legal systems of the original Member States, where it is of fundamental importance. [This, of course, was written in 1978, before cases such as O'Reilly v. Mackman [1983] 2 A.C. 237.] Constitutional law, administrative law and tax law are all included in "civil law".

In short, the sentence was added simply to make plain that these public law matters were not "civil" matters for the purposes of the Convention.

[13] There is no definition of "revenue matters" in the Convention and no decision of the European Court bearing on the point. What then, one must ask, would the original Member States themselves regard as revenue matters for this purpose? Do they subscribe to the legal principle enshrined in Dicey's rule 3

and in particular that part of the rule barring the indirect enforcement of foreign revenue laws in a case like Buchanan (and therefore the present case too)?

[14] I understand the appellants to accept that direct revenue claims would fall within the exception. What they argue, however, is that indirect claims are not excluded and certainly not a claim like the present. This, they submit, is a private law claim not merely in form but in substance. The difficulty with this argument, however, is that it necessarily implies that Buchanan was wrongly decided and that the courts of other Member States, unlike the House of Lords, would so regard it. Nothing that we have been shown in the foreign jurisprudence or commentaries supports such a view. Moreover the respondent's contrary argument is a powerful one. As Dicey states [FN11]:

FN11 At pp. 97-99.

There is a well-established and almost universal principle that the courts of one country will not enforce the penal and revenue laws of another country.

Direct enforcement occurs where a foreign state or its nominee seeks to obtain money or property, or other relief, in reliance on the foreign rule in question. But indirect enforcement is also prohibited, for a foreign State cannot be allowed to do indirectly what it cannot do directly. Indirect enforcement is, however, easier to describe than to define.

Indirect enforcement occurs where the foreign State (or its nominee) in form seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give it extra-territorial effect ... [Buchanan is then given as an example as this type of indirect enforcement]

[15] Government of India v. Taylor, [FN12] in which Kingsmill Moore J.'s judgment in Buchanan (upheld in the Irish Supreme Court) was so warmly endorsed, was itself, Mr Vajda points out, a case of direct enforcement. In Re State of Norway's Application, [FN13] however, was concerned with another aspect of indirect enforcement: a foreign state seeking assistance in obtaining evidence here to be used in enforcing its own revenue laws at home. Before concluding that rule 3--which he describes as "a fundamental rule of English law"--did not go so far as to preclude this, Lord Goff of Chieveley said this:

FN12 Cited above.

FN13 Cited above.

*14 I must confess to having given the most anxious consideration to this question. First, the rule is deeply embedded not only in the common law but also in the law of civil law countries. An eloquent account of it in French law is to be found in the exposition by Professor Mazeaud of Bemburg v. Fisc de la Province de Buenos Aires, 24 February 1949; Tribunal de la Seine; [1949] Semaine Juridique, II, 4816. Secondly, there appears to exist no case of fiscal proceedings, in relation to which letters of request have been executed in any jurisdiction; and it can be argued (as indeed it is argued by Mazeaud) that, if a change has to be made, it should be made by legislation and not by judicial decision.

[16] In Bemburg, [FN14] one may note, the French court had refused letters rogatory and, commenting approvingly upon the decision, Professor Mazeaud observed:

FN14 [1949] Semaine Juridique II 4816.

It is a rule now well-established of our law and of international custom that besides treaties, in tax matters everyone is master in his own State and the authority of each individual State does not go beyond its own frontiers. This applies to all areas of tax such as the amount that will be taxed, the recovery of taxes, the levying of individual taxes, and fines. ... It may be considered that this line of thinking is obsolete, but it still remains anchored within us that we will not permit the presence in our country of foreign tax men, even if represented by intermediaries; we do not tolerate that any help may be given to them.

[17] That same approach is reflected also in

Professor Batiffol's Droit International Prive, [FN15] which includes a footnoted reference to Heritiers Vogt v. Feltin, a decision of the Cour de Cassation in 1928 going significantly further than Buchanan in the prohibition of indirect enforcement. The court there refused to allow the plaintiff, whose shares had been seized and sold by the German government in Alsace in 1918 to discharge a tax liability, to recoup from the defendant his share of the original debt. Whether, as a note to the report suggests, Vogt went perhaps too far, for present purposes matters not. There is no reason to doubt that the rule in France is just as fundamental and far reaching as in England and that it is rightly described in both jurisdictions as a rule of international application. I should add that we were shown no contrary jurisprudence from any other Member State.

FN15 (7th ed., 1981).

[18] Before leaving Issue 1, there is just one other aspect of the appellants' arguments I should briefly notice. Mr Vajda sought to submit that rule 3, at any rate in so far as it extends to indirect enforcement, is a product of its times and no longer to be regarded as sound, least of all in a Community law context. Vogt, he points out, was decided in the aftermath of the First World War, Bemburg and Buchanan not long after the Second World War.

[19] To my mind, however, there is nothing in this argument. Hardly surprisingly, Mr Vajda was quite unable to formulate satisfactory limits to the rule's application, whether temporal or territorial. I*15 repeat, as late as 1990 the House of Lords was continuing to describe the rule, in the context of an application from Norway, as "a fundamental rule of English law".

[20] All that said, I for my part would wish to emphasise the relative narrowness of rule 3 in so far as it applies to this particular kind of indirect enforcement. As Lord Mackay of Clashfern said in Williams and Humbert Ltd v. W. & H. Trade Marks (Jersey) Ltd [FN16]:

FN16 [1986] A.C. 368.

From the decision in the Buchanan case [1955] A.C. 516 counsel for the appellants sought to derive a general principle that even when an action is raised at the instance of a legal person distinct from the foreign government and even where the cause of action relied upon does not depend to any extent on the foreign law in question nevertheless if the action is brought at the instigation of the foreign government and the proceeds of the action would be applied by the foreign government for the purposes of a penal revenue or other public law of the foreign State relief cannot be given. It has to be observed that in the Buchanan case the action was being pursued by a person whose title as liquidator of the company depended on his having been appointed by a petition to the court in Scotland on behalf of the Inland Revenue, that the ground of action was that the transactions being attacked in the proceedings in Dublin were ultra vires and dishonest because there existed at the time that they were effected in Scotland a claim by the Inland Revenue which the transactions were designed to defeat, and that if no such claim existed the defendant would have been entitled to retain the subject-matter of the claim. Most important there was an outstanding revenue claim in Scotland against the company which the whole proceeds of the action apart from the expenses of the action and the liquidation would be used to meet. No other interest was involved. That this was regarded as of critical importance appears from what was said in the decision on appeal by Maguire C.J., at page 533.

Having regard to the questions before this House in Government of India v. Taylor [1955] A.C. 491 I consider that it cannot be said that any approval was given by the House to the decision in the Buchanan case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state. No countenance was given in Government of India v. Taylor, in Rossano's case [1963] 2 Q.B. 352 nor in Brokaw v. Seatrain U.K. Ltd [1971] 2 Q.B. 476 to the suggestion that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. The existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle enunciated in the Buchanan case [1955] A.C. 516 for refusing to allow the action to succeed.

[21] I can readily understand Lord Mackay's insistence on the narrowness of the Buchanan decision and his approach certainly appears consistent with the view of the editors of Cheshire & North's Private International Law [FN17]: "It is questionable whether the general ban on indirect enforcement is not too rigid." They do not, however, criticise Buchanan and, as I repeat, the present case is ***16** indistinguishable from Buchanan: both are to be regarded as cases where the liquidator, as nominee for a foreign State, in substance is seeking a remedy designed to give extra-territorial effect to foreign revenue law. In my judgment such claims plainly fall within the compass of revenue matters as that expression would be understood by all Member States for the purposes of Article 1 of the Convention.

FN17 (12th ed., 1992) at p. 116.

Issue 2: Can the claim be struck out even if the Convention applies?

[22] In holding that it can, Sullivan J. said this:

The Convention confers jurisdiction upon the courts of the Contracting Parties to entertain proceedings falling within its scope. Having done so, it does not seek to regulate the details of the procedures to be followed in the courts of the Contracting Parties. Thus it does not prevent the High Court from striking out proceedings brought in this country on the grounds of limitation, on the ground that they are vexatious or frivolous or otherwise an abuse of the process of the court, because, for example, they are bound to fail. Applying the dicta in Buchanan to the present case, and substituting the Danish tax authorities for the Scottish revenue, it is plain that the English proceedings are bound to fail.

Before examining that conclusion, I should note that although rule 3 is framed in Dicey as a rule that "English courts have no jurisdiction to entertain" actions of the kind in question, both sides accept Lord Goff's dictum in In Re State of Norway's Application:

... that the rule does not affect the jurisdiction of the court, but is concerned rather with circumstances in which the court declines to exercise its jurisdiction.

[23] In challenging the judge's conclusion on this point, the appellants rely principally upon the decision of the European Court in Case C-365/88, Kongress Agentur Hagen GmbH v. Zeehaghe BV. [FN18] In that case a Dutch hotel group brought proceedings in Holland against a German agent who on behalf of his German principal had booked and then cancelled a large number of hotel rooms. When the agent sought to third party his principal under a guarantee, jurisdiction for which was provided by Article 6(2) of the Convention, the plaintiffs objected on the ground that this would complicate the proceedings. The question for the European Court of Justice was whether the Dutch court could "assess the admissibility [i.e. merits] of the application for leave [to bring third-party proceedings] in the light of the rules of the national procedural law". Having concluded that Article 6(2) merely determines which court had jurisdiction and "is not concerned with conditions for admissibility properly so called", the court continued:

FN18 Case C-365/88, Kongress Agentur Hagen GmbH v. Zeehaghe BV [1990] E.C.R. I-1861; [1991] I.L.Pr. 3.

[20] It should be noted, however, that the application of national***17** procedural rules may not impair the effectiveness of the Convention. As the Court has held, ... a court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the rules of jurisdiction laid down in the Convention.

[21] Accordingly an application for leave to

bring an action on a warranty or guarantee may not be refused expressly or by implication on the ground that the third parties sought to be joined reside or are domiciled in a Contracting State other than that of the court seised of the original proceedings.

[24] Assuming that the present claim is a civil matter within Article 1 and, therefore, that under Article 2 there is jurisdiction to bring it in England against the respondent as someone domiciled here, the appellants submit that rule 3 cannot properly be invoked so that the court immediately then declines to exercise its jurisdiction: such an application of rule 3 would clearly "impair the effectiveness of the Convention".

[25] Mr Ivory Q.C. for the respondent submits the contrary. He argues that rule 3 is not concerned with the appropriate place for the trial of this action. There is, he submits, really no difference between striking out the claim under rule 3 and striking it out because on some other ground it is bound to fail, for example, for lack of merit or under the Limitation Act.

[26] On this issue it seems to me that the appellants' argument is plainly right. The necessary corollary of rule 3 is that any such claim as this can only properly be brought in the tax authority's own courts. Were the Convention to apply, rule 3 would seem to me not merely to impair its effectiveness but indeed substantially to derogate from it.

Issue 3: Must the Court exercise its jurisdiction to hear this claim even if the Convention does not apply?

[27] In submitting that it must, and that rule 3 (in so far as it relates to this kind of indirect enforcement) is incompatible with Community law, Mr Vajda's argument can, I think, be summarised as follows:

i. Assuming that the Convention does not extend to this claim, it follows that the national rules on jurisdiction and enforcement apply.

ii. Those national rules are, and have always been, subject to the rules of the Treaty. The Convention does not alter or reduce the scope of the Treaty.

iii. The liquidator is seeking to provide a cross-border service within Article 59 of the Treaty, namely the recovery in England of monies owed to Danish companies for which he is being remunerated by the Danish tax authorities.

iv. Rule 3 has the effect of restricting the liquidator's rights under Article 59.

v. Such a restriction needs to be objectively justified and,***18** submits Mr Vajda, no such justification exists in the present case.

[28] As I indicated earlier, this argument was not advanced below. Let me, however, for present purposes assume the correctness of the first four propositions, and examine only the fifth. Essential to it is Mr Vajda's criticism of the reasoning underlying the rule. This reasoning was addressed by Lord Keith in Government of India v. Taylor [FN19]:

FN19 At p. 511.

One explanation of the rule ... may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim for a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties. Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of Moore v. Mitchell, in a passage, quoted also by Kingsmill Moore J. in the case of Peter Buchanan as follows:

While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognise those arising in a foreign State, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognised and which has been applied by a consistent train of decisions. It may be possible to find reasons for modifying the rule as between States of a federal union. But that consideration, in my opinion, has no relevance to this case.

[29] Mr Vajda accepts that the first of those two explanations (the invasion of sovereignty objection) applies no less today than in times past and, indeed, applies equally amongst the Member States of the European Union as amongst other nations. That, he says, justifies the exclusion of direct enforcement claims which plainly raise this particular objection. He submits, however, that this first explanation has no application to indirect enforcement claims. In the present action, he argues, Denmark is not asserting any sovereign authority;***19** rather the claim is brought by the appellant companies in liquidation. What then of the second explanation, the need to guard against the embarrassment of having to scrutinise foreign revenue laws, the explanation given originally by Judge Learned Hand and elaborated later by Kingsmill Moore J. in Buchanan? What Mr Vajda submits in this regard is that there can be no possible need in a case like the present to scrutinise Dutch tax law so that this second explanation (which in any event is fanciful within the context of the European Community) cannot apply either.

[30] In my judgment these arguments are misconceived. Once it is recognised that an indirect claim is caught by rule 3 simply because it is in substance a claim brought by a nominee for a foreign State to give extra-territorial effect to that State's revenue law, both explanations apply equally to justify a bar on indirect claims as on direct claims. Once the court rejects (as on the authority of Buchanan it must reject) Mr Vajda's core argument that this is a private law claim not merely in form but in substance, there can be no better reason for allowing indirect claims than direct ones.

[31] Of course I acknowledge that within the European Union there may be good arguments for disapplying rule 3 with regard to both direct or indirect claims. But that is by no means to say that the rule can now be circumvented in the way Mr Vajda suggests. As Lord Templeman said in Williams and Humbert [FN20]:

FN20 At p. 428.

This rule with regard to revenue laws may in the future be modified by international convention or by the laws of the European Economic Community in order to prevent fraudulent practices which damage all States and benefit no State. But at present the international law with regard to the non-enforcement of revenue and penal laws is absolute.

[32] Mr Vajda submits that the present case is indistinguishable from Hubbard v. Hamburger [FN21] in which an order for security for costs was being sought against an English solicitor who, in the capacity of executor, was seeking to recover part of the testator's estate in Germany. The court held that:

FN21 Case C-20/92, Hubbard v. Hamburger

[1993] E.C.R. I-3777.

Articles 59 and 60 must be interpreted as precluding a Member State from requiring security for costs to be given by a member of a profession established in another Member State who brings an action before one of its courts, on the sole ground that he is a national of another Member State.

So far from being indistinguishable, that case seems to me to provide no assistance whatever. It simply never had to engage the fundamental principle enshrined in rule 3. That principle underlies Article 1 of the Convention. So too, in my judgment, it provides the necessary justification for any restrictions which necessarily flow from its application.

***20** Very fully though Mr Vajda developed his arguments on this third issue, I think it unnecessary to say more about it.

Article 1.2 of the Convention

[33] The second paragraph of Article 1 provides:

The Convention shall not apply to:

...

2. bankruptcy, proceedings relating to the winding-up of insolvent companies ...

The respondent contends that, whether or not this is a revenue matter, it in any event constitutes "proceedings relating to the winding-up of insolvent companies".

[34] In my judgment, however, the argument is unsound. It was held by the European Court in Case 133/78, Gourdain v. Nadler [FN22]:

FN22 Case 133/78, Gourdain v. Nadler [1979] E.C.R. 733; [1979] 3 C.M.L.R. 180, at p. 733 (E.C.R.).

... it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Convention, that they must derive directly from the bankruptcy or winding-up ...

That decision was applied by the European Court in Duijnstee v. Goderbauer [FN23] where a liquidator sought to recover a patent from an employee of the company, a claim held not to be excluded from the Convention. The position here is no different from that in Duijnstee: neither claim relies on any special power in the liquidator (for example, a power to bring misfeasance proceedings). The claims could just as well have been brought by the companies prior to their liquidation. They do not, therefore, "derive directly from the ... winding-up" so as to fall within the exception.

FN23 Case 288/82, Duijnstee v. Goderbauer [1983] E.C.R. 3663; [1985] 1 C.M.L.R. 220.

Reference to the European Court of Justice

[35] Mr Vajda submits that if this court were to have any doubts on the interpretation of the relevant Community law, the appropriate course would be to make a reference under Article 234 of the Treaty (the old Article 177) and the 1971 Protocol to the Convention. For my part I entertain no such doubts, certainly on issues 1 and 3, on one of which the appellants need to succeed.

It follows that in my judgment this appeal should simply be dismissed.

Auld L.J.:

[36]

I agree.

Thorpe L.J.:

[37]

I also agree.

Appeal dismissed with costs.

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